

U.S. BANKRUPTCY COURT
IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN RE:	\$	
	\$	
PRECEPT BUSINESS SERVICES, INC.,	\$	CASE NO. 01-31351-SAF-7
et al.,	\$	
DEBTOR(S).	\$	
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STEVEN S. TUROFF, CHAPTER 7	\$	
TRUSTEE,	\$	
PLAINTIFF,	\$	
	\$	
VS.	\$	ADVERSARY NO. 02-3583
	\$	
DARWIN DEASON, et al.,	\$	
DEFENDANTS.	\$	

MEMORANDUM OPINION AND ORDER

W. Anthony Huff and Logistics Management, LLC, move the court to dismiss the second amended complaint filed by Steven S. Turoff, the Chapter 7 trustee of the bankruptcy estates of Precept Business Services, Inc., et al. Huff and Logistics premise their motion on Fed. R. Civ. P. 12(b)(1) and (b)(6), made applicable by Bankruptcy Rule 7012, and Rule 9(b), made applicable by Bankruptcy Rule 7009. Turoff opposes the motion. The court conducted a hearing on the motion on August 11, 2003.

Under Rule 12(b)(6), the court must determine, in the light most favorable to Turoff, whether the complaint states any valid claim for relief. Cinel v. Connick, 15 F.3d 1338 (5th Cir. 1994). A complaint may not be dismissed for failure to state a

claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court must accept as true all well-pleaded allegations contained in the complaint. Albright v. Oliver, 510 U.S. 266 (1994). The facts pled must be specific, however, and not merely conclusory. Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992).

Under Rule 9(b), pleading fraud with particularity requires "time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby.'" Williams v. WMX Techs., Inc., 112 F.3d 175, 177 (5th Cir. 1997).

Civil Conspiracy

In count 14 of the second amended complaint, civil conspiracy, Turoff alleges that Huff with others acted to accomplish what the complaint describes as "the Stock Scam." Huff appears to invoke both Rules 12(b)(6) and 9(b) to support his request that the count be dismissed.

The elements of a claim of civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result. Jackson v. Radcliffe, 795 F.Supp. 197, 209 (S.D. Tex. 1992).

Huff argues that the complaint does not allege a meeting of the minds involving Huff to defraud Precept's bank creditors or other creditors, that the complaint alleges no unlawful acts by Huff and that the alleged acts did not harm Precept, even if the acts harmed the banks. Huff argues that Turoff lacks standing to prosecute the banks' claims.

Turoff contends that the Stock Scam ultimately resulted in a stock repurchase program by Precept that damaged Precept. Huff responds that the allegations are illogical and that the complaint makes no factual connection between the Stock Scam and the stock repurchase. However, the court cannot conclude that Turoff can prove no set of facts tying Huff's actions to the eventual stock repurchase program by Precept. Consequently, the court cannot conclude that Turoff cannot prove damages to Precept. Under the civil conspiracy claim, Turoff alleges that others, not Huff, committed unlawful acts. Thus, the court cannot determine that Turoff can prove no set of facts for a civil conspiracy that damaged Precept.

With regard to Rule 9(b), the civil conspiracy concerns alleged overt acts of fraud. The complaint is difficult to follow concerning the particularities of the fraud allegation. Rule 9(b) contemplates a full, particular statement. As the court observed in its June 2, 2003, rulings on several motions to dismiss, the statement needs to be focused, particular and in a

section of the complaint that can be read without referencing numerous other paragraphs to determine if the requisite particular allegations have been made. The civil conspiracy to commit a fraud count must be replead.

The complaint appears to allege damage to Precept's bank creditors. As part of a court-approved settlement in the underlying bankruptcy cases, Bank One and Wells Fargo, creditors, transferred their claims against certain persons to the bankruptcy estate. Huff contends that Turoff lacks standing to prosecute the assigned bank claims against him. Huff also contends that the assignments are void under Texas law. With regard to those contentions, the court adopts its rulings on the motions to dismiss by Darwin Deason and others rendered from the bench on June 2, 2003.

However, those rulings do not dispose of Huff's motion. The banks' assignment reads:

Assignors hereby fully and unconditionally transfer, convey and assign to Assignee, as is, where is, with all faults and without recourse, for the benefit of the Bankruptcy Estates, all of their right title and interest in any and all claims, causes of action or rights to payment, whether known or unknown, direct or indirect, matured or unmatured, contingent or non-contingent, liquidated or unliquidated, that Assignors could assert against: (i) all persons who served at any time as officers of any of the Debtors, but only with respect to such persons' actions in such capacity, (ii) all persons who served at any time as directors of any of the Debtors, but only with respect to such persons' actions in such capacity, (iii) all professional persons retained or employed at any time by any of the Debtors, including, without limitation, accountants and

attorneys, but only with respect to such persons' actions in such capacities and (iv) all persons or entities liable to the Debtors or Assignors as insurers, sureties or in similar capacities for the actions or conduct of the persons listed above in (i), (ii) and (iii) (collectively, the "Claims"). Notwithstanding the forgoing, the Banks do not transfer, convey or assign any interest in any claim against any Bank Released Parties (as such term is defined in the Compromise and Settlement Agreement). Furthermore, notwithstanding the forgoing, should the assignment referenced herein be judicially declared to be void, in whole or in part, then to that extent this assignment shall be deemed to be void ab initio.

Huff never served as an officer or director of the Precept debtors. Huff was not a professional person retained by or employed by the Precept debtors. He is not an insurer. As a result, the assignment does not transfer bank claims for civil conspiracy against Huff to the Precept bankruptcy estate. To the extent that count 14 is premised on damages to the banks, Turoff lacks standing to prosecute the claim and it must be dismissed.

Accordingly, to the extent that the civil conspiracy count is premised on a claim of damages to Precept, the motion to dismiss is denied. To the extent that the count is premised on a claim of damages to the banks, with the claims assigned to the bankruptcy estate, the motion is granted.

Aiding and Abetting Breaches of Fiduciary Duty

In count 18 of the second amended complaint, Turoff alleges that Huff aided and abetted breaches of fiduciary duties by named officer and director defendants. Huff argues that Turoff premises the count on a contention that the officers and

directors owed a fiduciary duty to Precept's creditors. The court adopts its rulings rendered June 2, 2003, on the motions to dismiss by Peter Trembath and others concerning the Texas Trust Fund Doctrine. Applying that ruling, to the extent that count 18 is premised on a breach of a fiduciary duty by the officers and directors owed to Precept's creditors, the motion to dismiss will be granted.

However, Turoff also alleges that the officers and directors breached a fiduciary duty to the Precept corporation itself. A corporation's officers and directors owe a fiduciary duty to the corporation itself. Based on the allegations of the complaint, the court cannot conclude that Turoff can prove no set of facts that Huff aided and abetted a breach of a fiduciary duty by the officer and director defendants to Precept itself. To the extent that count 18 is premised on a breach of a fiduciary duty to the corporation, the motion to dismiss will be denied.

Unjust Enrichment

In count 10, Turoff seeks to recover a judgment from Huff based on unjust enrichment. Huff moves to dismiss the count for failure to state a claim for relief. Turoff alleges that Huff had been unjustly enriched, to Precept's and Precept's creditors' detriment, by the benefits he received from the Stock Scam. Huff contends that he received no benefits, only litigation expenses.

In Texas, unjust enrichment provides a remedy, not a cause

of action. City of Corpus Christi v. Heldenfels Bros., Inc., 802 S.W.2d 35 (Tex. App.-Corpus Christi 1990), *aff'd*, 832 S.W.2d 39 (Tex. 1992). To apply the remedy, Turoff must show that Huff has obtained the benefit from another by fraud, duress, or the taking of an undue advantage. Heldenfels Bros. v. City of Corpus Christi, 832 S.W.2d 39, 41 (Tex. 1992); Pope v. Garrett, 211 S.W.2d 559, 560-62 (Tex. 1948). "Unjust enrichment is not, however, a proper remedy merely because it 'might appear expedient or generally fair that some recompense be afforded for an unfortunate loss' to the claimant, or because the benefits to the person sought to be charged amount to a windfall." Zapata Corp. v. Zapata Gulf Marine Corp., 986 S.W.2d 785, 788 (Tex. App.-Houston 1999) (*citing Pope*, 211 S.W.2d at 562). In order to be actionable, the profit must under equitable principals be deemed "unjust." Harris v. Sentry Title Co., 715 F.2d 941, 949 (5th Cir. 1983).

If the predicate factual circumstances are established at trial, the court cannot conclude from the complaint that Turoff can prove no set of facts to recover based on unjust enrichment. The court cannot conclude that Turoff cannot establish a benefit to Huff that harmed Precept as a result of one of the claims asserted against Huff. The court applies its ruling on David Neely's motion to dismiss, rendered June 2, 2003, and denies the motion to dismiss this count.

Statute of Limitations

Huff contends that count 10, unjust enrichment, and count 14, civil conspiracy, must be dismissed as time barred. The parties agree that a two-year statute of limitations applies to both counts. Turoff invokes the discovery rule. The court adopts its statement of the discovery rule from the ruling rendered June 2, 2003, on the motion to dismiss filed by Michael Margolies.

Huff contends that the only inference to be drawn from the complaint is that Precept knew or should have known, under the discovery rule, of Huff's alleged actions concerning the Stock Scam by February 12, 1999. Based on the complaint, Huff's conduct ended on that date. Precept filed its bankruptcy petition on February 22, 2001. Turoff filed the complaint on November 27, 2002. Accepting Huff's reading of the complaint, limitations would have run February 12, 2001. The counts would be time barred.

Turoff responds that Precept should not have learned of the factual basis for the counts until March 9, 1999. Limitations would not have run by the time of the filing of the bankruptcy petition. Under the Bankruptcy Code, 11 U.S.C. § 108, the complaint would be timely.

Precept would have learned of the factual basis through its officers and directors. Those officers and directors are

defendants in this adversary proceeding, and are alleged to be part of the Stock Scam. Given their fiduciary status, the discovery rule is relaxed. In a fiduciary context, the nature of the injury is presumed to be inherently undiscoverable, as this court held on the Margolies motion to dismiss. Considering the factual allegations of the complaint, on a Rule 12(b)(6) motion, the court cannot conclude that Turoff will not meet his burden with respect to the application of the discovery rule. As a result, the court cannot dismiss the counts on a limitations basis at this stage of the proceedings.

Sections 544 and 550

In count 51 of the second amended complaint, Turoff seeks to avoid under 11 U.S.C. § 544 an allegedly fraudulent transfer to Huff and Logistics Management. In count 54, Turoff seeks a money judgment under 11 U.S.C. § 550 for the avoided transfer. Huff and Logistics Management move to dismiss the counts for failure to state a claim. They contend that Turoff does not allege that they acted with fraudulent intent.

The court notes that Huff and Logistics Management do not seek to dismiss the counts for failure to allege a constructively fraudulent transfer. Turoff has alleged the factual predicate for a constructively fraudulent transfer. Huff and Logistics contend that Turoff has not alleged a transfer with the intent to hinder, delay or defraud creditors. However, Turoff does allege

that Huff and/or Logistics Management received the transfer with the actual intent to hinder, delay or defraud Precept's creditors. The court cannot conclude that Turoff can prove no set of facts to recover a money judgment upon an avoided transfer. The motion to dismiss these counts must be denied.

Based on the foregoing,

IT IS ORDERED that the motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that:

1. Regarding count 14, to the extent that the civil conspiracy count is premised on a claim of damages to Precept, the motion to dismiss is denied. To the extent the count alleges civil conspiracy to commit a fraud, the count shall be replead with particularity. To the extent that the count is premised on a claim of damages to the banks, with the claims assigned to the bankruptcy estate, the motion is granted.
2. Regarding count 18, to the extent that count 18 is premised on a breach of a fiduciary duty by the officers and directors owed to Precept's creditors, the motion to dismiss is granted. To the extent that count 18 is premised on a breach of a fiduciary duty to the corporation, the motion to dismiss is denied.
3. Regarding count 10, the motion to dismiss is denied.

4. Regarding counts 51 and 54, the motion to dismiss is denied.

Signed this 5th day of September, 2003.

A handwritten signature in black ink, appearing to read "Steven A. Felsenthal", written over a horizontal line.

Steven A. Felsenthal
United States Bankruptcy Judge